FLEXIBILITY IN REZONINGS AND RELATED GOVERNMENTAL LAND USE DECISIONS

CRAIG A. PETERSON*

I. INTRODUCTION

During the summer of 1974 this author conducted a general study of zoning administration[1] in Ohio's seven largest cities.[2] This study was the preliminary step in a broader consulting effort financed by the City of Toledo and relating to a proposed revision of its zoning ordinance,[3] and included a review of the zoning ordinances of the various cities and several statistical projects undertaken by law students.

The study's principal methodology was field work because, as author-attorney Richard Babcock has noted in his influential work *The Zoning Game*,

> [M]uch of what does take place in this field is not discernable from the literature. Of all the areas of the law, zoning is the least susceptible to academic scrutiny. In no other field of the law is it as difficult to grub out what is taking place from the court decisions, professional journals and model statutes. A vast amount of the decision-making is not on record. When it is available, it is often denoted in such detail to the minute facts of individual cases that it is almost impossible to marshal, much less analyze the bases of decisions.[4]

Thus the data upon which this article is based was composed largely of tape recorded interviews with the participatants in the "zoning game"—city councilmen, plan commissioners, members of boards of zoning appeals, planning staff members, private attorneys and interested citizens.[5] In many cases, it was also possible to examine and study such documents as staffing memoranda, minutes of hearings, administrative forms and rules and regulations.

Of all the specialized zoning approaches surveyed, no category

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* Assistant Professor of Law, The John Marshall School of Law, Chicago, Illinois. The author wishes to acknowledge the aid of Jacqueline M. Boney's research in the preparation of Part III of this article.

[1] The study included the five major functional areas of zoning activity: routine administration and enforcement; appeals from decisions of the administrative official; variance administration; special permit administration; and amendments to zoning ordinance.

[2] Akron, Cincinnati, Columbus, Cleveland, Dayton, Toledo and Youngstown.

[3] TOLEDO, OHIO, MUNICIPAL CODE ch. IX (1959).

[4] R. BABCOCK, THE ZONING GAME, XV-XVI (1966).

[5] The author is most appreciative of the assistance of such persons, without whose cooperation this study would not have been possible. All interviews were conducted with the assurance that interviewees would not be identified in any written product based thereon.

was more significant or varied than what might be termed "restrictive rezoning development approval techniques." These are devices designed to provide zoning authorities with flexibility in the approval of developments in locations where normal zoning classifications would prohibit the development. Such approvals are often but not always rezonings. It is apparent that the absence of such flexibility devices in two cities[6] was generally regarded as an impediment to appropriate control of development.

To illustrate the value of the flexibility techniques imagine a hypothetical proposal in a city not having adopted a restrictive rezoning/development approval technique. A local school teacher has obtained an option to purchase a large Victorian home in order to operate a child day-care center for use by working mothers. The house is located on a large corner lot abutting a major thoroughfare and across the street from two neighborhood commercial establishments. The land is zoned "R-1," that is, exclusively for single family homes. The optionee learns that a day-care center cannot be established in a R-1 district, but if the land were rezoned to a B-2 business classification such a center could be operated. The optionee consults with his or her alderman, neighbors, and the city planning staff, all of whom may have mixed feelings about a rezoning proposal. They recognize the need for such a specialized facility but they fear possible adverse effect on the surrounding area caused by anticipated increases in traffic, noise, litter, and by the potential introduction of a broad range of business uses other than day-care centers that are permitted in a B-2 district.

A restrictive rezoning/development approval technique permits the interests of all parties to be accommodated. The community could address itself to the merits of the specific day-care center proposal and approve that proposal without incurring the risk that other B-2 type establishments could open. A reasonable accommodation in this situation would be for the city to permit a change in use to a day-care facility subject to detailed restrictions such as maximum enrollment; minimum number of licensed supervisors; minimum and maximum number of staff and visitor parking spaces; prior approval of the use, height, location and ground area of all present and proposed buildings and structures; and prior approval of the location and detail of all off-street access roads.

The scope of this article is limited to a discussion of devices that

[6] Toledo in particular, as indicated more fully in Part III of this Article. Several persons interviewed in Youngstown commented on that city's need for such techniques.

would permit development in most if not all cases of proposed higher-intensity development that would not otherwise be allowed by the zoning classification of the site. No attention is directed to planned unit developments,[7] or to special site plan review procedures that operate in connection with conditional or special uses.[8]

Section II of this paper discusses certain recent judicial and legislative developments relating to restrictive rezoning/development approval techniques as a background for Section III. The data from the studies in Toledo, Ohio is used in Section III to suggest the desirability of adopting a restrictive rezoning technique. Sections IV through VIII outline the contours of the techniques and illustrate the operation of a variety of different techniques in use in five large Ohio cities. The techniques vary considerably with regard to such matters as: (1) type of land reclassification and/or permit, (2) extent and nature of substantive criteria, (3) degree of procedural formality, (4) degree of reliance on and/or delegation of authority to administrative officials and bodies, and (5) type and character of routine administration and enforcement.

In conclusion, Section IX argues that cities should consider carefully the inclusion of a restrictive rezoning/development approval technique in their zoning ordinances that would be acceptable to public officials, private citizens, and the various interest groups who participate in the land use decision making processes. These techniques should be used to implement the planning and zoning policies of the cities.

Restrictive rezoning/development approval techniques are one aspect of an extensively documented[9] growth of flexibility in zoning

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[7] The term "planned unit development" refers to "a legal technique that combines both zoning and subdivision regulations for the purpose of permitting a unified development of large tracts of land. It is especially useful in cases in which standard, uniform provisions for uses, density, open space and bulk do not appear to work well. A planned development. . . . necessarily requires a departure for standard zoning and subdivision controls." F. MAUCK & W. WARNOCK, THE SUBSTANCE OF LAND USE CONTROLS; LAND USE AND ZONING IN ILLINOIS 2-29 (1974); *See generally* J. Krasnowiecki, *Planned Unit Development: A Challenge to Established Theory and Practice of Land Use Control*, 114 U. PA. L. REV. 47 (1965).

[8] Special or conditional uses are those which may be permitted by the city council, planning commission, or board of zoning appeals, but only if the substantive and procedural conditions set forth in the ordinance are met. Such a permit is often issued subject to a variety of conditions so as to minimize the adverse effect of the use on the public and the neighborhood. Unlike a rezoning, the zone classification is not changed upon the issuance of a special or conditional use permit. *See generally* HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW 206-207 (1971); Note, *The Use and Abuse of the Special Permit in Zoning Law*, 35 BROOKLYN L. REV. 258 (1969).

[9] *See generally* R. BABCOCK & J. BANTA, NEW ZONING TECHNIQUES FOR INNER-CITY AREAS (1974); N. MARCUS & M. GROVES, THE NEW ZONING (1970); Craig, *Discretionary*

administration, reflecting a heightened concern for the appropriate use of land. Bosselman and Callies point out[10] that a dramatic change has taken place in public attitudes towards land. Previously regarded principally, if not exclusively, as a commodity, land is now looked upon also as a resource. Reflecting the earlier "commodity" emphasis was the traditional concept that development that was not harmful to property values should go unregulated or be subject to minimal regulation. Hence, zoning and subdivision controls were designed principally to enhance the marketability of land. During the past twenty years however, "a realization [grew] that important social and environmental goals require more specific controls on the use that may be made of scarce land resources."[11] That realization generated not only increasing state participation in certain land use decisions, but also responses by local governments:

> Modern zoning ordinances typically rely less and less on pre-stated regulations and require developers to work with local administrative officials in designing a type of development that fits more closely into the specific circumstances of the surrounding neighborhood.[12]

Restrictive rezoning/development approval techniques are an important example of a "wait and see" approach to land use controls. Using this approach local governments "turn away from detailed preregulation of new development and instead rely more on administrative review of development proposals, retaining the discretion to say yes or no until (the government) has reviewed the proposal."[13] This type of review differs significantly from a "surroundings first" approach, which is typified by the inquiry: "We have a pleasant neighborhood here and woods over there. What kinds of development would be consistent with their continued enjoyment?"[14] Traditional zoning ordinances are premised on the "surroundings first" view, in that they provide for mapped zones within which specific regulations either permit or prohibit certain types of development.[15]

Land-Use Controls—The Iron Whim of the Public, 1971 SW. INST. ON P., Z., AND E.D. 1 (1972); Ward, *Site Plan Review in Zoning*, 3 LAND-USE CONTROLS Q. (No. 2) 1 (1969); Comment, *Administrative Discretion in Zoning*, 82 HARV. L. REV. 668 (1969); Note, *The Administration of Zoning Flexibility Devices: An Explanation for Recent Judicial Frustration*, 49 MINN. L. REV. 973 (1965).

[10] F. BOSSELMAN & D. CALLIES, THE QUIET REVOLUTION IN LAND-USE CONTROLS 314-318 (1971).

[11] *Id.* at 317.

[12] *Id.*

[13] W. REILLY, THE USE OF LAND 189 (1973).

[14] *Id.* at 182.

[15] Babcock suggests that the rigidity of an exclusively mapped zone system created prob-

II. Selected Judicial and Legislative Developments Respecting Restrictive Rezoning/Development Approval Techniques

While it is beyond the scope of this article to supplement the efforts of others[16] in collecting cases relating to and analyzing arguments advanced in connection with the legal validity of those restrictive rezoning techniques generally categorized as "contract zoning" and "conditional zoning", it should be noted that judicial hostility to contract zoning has been widespread and that some courts have also declared conditional zoning invalid,[17] while other courts have upheld conditional zoning.[18]

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lems for suburban communities:

> The elementary concept of districting (each pig in its own pen) could not provide the agility a welterweight must have to defeat or at least to discourage a Goliath. Unable or, more accurately, unwilling, to join together to battle the metropolitan explosion and the sophisticated developmental techniques of the land promoters, the suburbs have seized upon each new device conceived by the planners to parry the blows of these formidable antagonists. Nowhere is this ingenuity more apparent than in the administrative devices which have been invented to provide the suburban communities with the discretion necessary to meet each new proposal of those who would challenge their security.

R. Babcock, The Zoning Game 6 (1966).

[16] W. Strine, *The Use of Conditions in Land Use Control*, 67 Dick. L. Rev. 109 (1963); Trager, *Contract Zoning*, 23 Md. L. Rev. 121 (1963); E. Schaffer, *Contract and Conditional Zoning*, 11 Prac. Law. 43 (1965); Comment, *The Use and Abuse of Contract Zoning*, 12 U.C.L.A. L. Rev. 897 (1965); Comment, *Zoning and Concomitant Agreements*, 3 Gonzaga L. Rev. 197 (1968); R. Shapiro, *The Case for Conditional Zoning*, 41 Temp. L.Q. 267 (1968); Comment, *Contract Zoning: A Flexible Technique for Protecting Maine Municipalities*, 24 Maine L. Rev. 263, (1972); Note, *Contract and Conditional Zoning: A Tool for Zoning Flexibility*, 23 Hastings L. J. 825, (1972); Comment, *Contract and Conditional Zoning*, 51 J. of Urban Law 94 (1973); W. Miller, *The Current Status of Conditional Zoning*, 1973 Sw. Inst. on P., Z., and E. D. 121 (1974); A. Stefaniak, *The Status of Conditional Rezoning in Illinois—An Argument to Sustain A Flexible Zoning Tool*, 1974 Ill. Bar J. 132.

[17] Among the arguments advanced against contract zoning and conditional zoning are that the devices are beyond the delegated legislative authority because they are not authorized by the governing enabling statutes. Critics also charge that they violate the clauses of most enabling statutes that require uniformity within zoning districts, and they are violative of the requirement that zoning be "in accordance with a Comprehensive Plan." It is argued that they involve "spot zoning" by singling out a small area for special treatment. Additional arguments against contract zoning are that it fails to provide public notice because the legislative action in rezoning is subject to limitations contained in a private agreement not included in the text of the ordinance, and that it constitutes a "bargaining away" of the city's police power for the benefit of a private individual and not for the promotion of the public's health, safety, and welfare. These arguments are identified and discussed in A. Stefaniak, *The Status of Conditional Rezoning in Illinois—An Argument to Sustain a Flexible Zoning Tool*, 1974 Ill. Bar J. 132, 135-39.

[18] The split of authority is noted and documented in W. Miller, *The Current Status of Conditional Zoning*, 1973 Sw. Inst. on P., Z., and E.D. 121 (1974).

Labeling breeds confusion in this area,[19] but many of the judicial opinions suggest a difference between contract and conditional zoning. Contract zoning is often characterized by a written agreement between the developer and the legislative body pursuant to which the developer promises to subject his property to restrictions in exchange for which the legislative body agrees to rezone and not amend that zoning classification of the property for a specific period of time.[20]

Conditional zoning is generally regarded as a more varied technique, normally taking one of the following forms:

1) The applicant for rezoning is required to file certain deed restrictions prior to consideration of the rezoning.[21]

2) The rezoning is granted without conditions or prior written agreement, but after rezoning the developer "voluntarily" files deed restrictions without normal council request.[22]

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[19] R. Shapiro, *The Case for Conditional Zoning*, 41 TEMP. L.Q. 267, 269-70 (1968). Stefaniak argues that one of the problems inherent in traditional legal analysis of contract and conditional zoning is semantic, as evidenced by the frequency with which judicial opinions use the terms interchangeably. He recommends definitional refinement as a necessary first step to a clear discussion of the devices. The term conditional zoning should be utilized

> to denote a broad concept with express contractual agreements and the unilateral imposition of conditions being forms of the larger concept. Conditional rezoning occurs whenever a municipal authority reclassifies land with the reclassification being subject to special limitations on the use of the rezoned property not imposed upon other lands in the same classification or where the reclassification requires the landowner to perform some act such as making improvements on the rezoned property or paying money to meet community expenses incurred as a result of the reclassification. The special limitations on use or the acts required can be brought about through either unilateral imposition of conditions or an express agreement between the landowner and the municipality or rezoning authority. The unilateral imposition of conditions most commonly take one of two forms:
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> > Where a landowner requests that his property be rezoned to allow a use not permitted under existing restrictions, he may be advised that his land will be reclassified if he first executes and files a covenant which limits the use of his parcel in specific ways not common to other property similarly classified . . . . [Or,] [l]and may be reclassified subject to conditions not applicable to other property in the same or similar districts. (citation omitted)
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> The form of conditional rezoning typically referred to as contract zoning occurs when the municipality and the landowner enter into an express agreement in which both undertake reciprocal obligations. Any distinction between the two forms is tenuous and of no real import because both bring about the same result. Conditional rezoning in either of its forms is intended to reclassify land to allow a more beneficial use while imposing conditions ameliorating any hardships that the reclassification may impose on adjoining property owners or the community as a whole.

Stefaniak, *The Status of Conditional Rezoning in Illinois—An Argument to Sustain a Flexible Zoning Tool*, 1974 ILL. BAR J. 132, 134.

[20] R. Shapiro, *The Case for Conditional Zoning*, 41 TEMP. L.Q. 267, 269 (1968).

[21] *Id.* at 270.

[22] *Id.* at 273.

3) Prior to grant of the rezoning the developer files a deed restriction, motivated by a desire to "demonstrate his good intentions to the council and neighboring citizenry."[23]

4) Prior to the rezoning the planning commission, another non-legislative advisory body, requests and obtains an agreement to certain restrictions, after which a deed restriction is filed.[24]

5) "A purchaser of land will enter into a land sale contract with the seller that contains certain deed restrictions on the land involved. A condition precedent to the enforceability of the contract will be the adoption of a new use district by the local government. . . . The protective covenant in the deed will run with the land and be in favor of the local government. Upon application for rezoning, the contract and deed restrictions are made known to the city, and when the land is rezoned, the covenants become automatically enforceable by virtue of the occurrence of the condition precedent to the enforceability of the contract."[25]

6) The rezoning ordinance takes effect only if certain conditions are met within a specified period after the rezoning decision.[26]

7) The rezoning ordinance remains effective only for a specified period (one year) unless during that period (1) a building permit has been issued for a development that conforms with all listed specifications and (2) any necessary covenants have been executed and/or filed prior to the issuance of the building permit.[27]

There appear to be only two reported appellate decisions in Ohio passing directly on the legality of a restrictive rezoning technique. The first case arose in 1955. In *Johnson v. Griffiths*,[28] certain property was rezoned from a residential classification to an industrial zone, "subject to owners filing a restrictive covenant not to strip mine, such covenant to run with the land and to be filed with the [county] recorder."[29] The Ohio Court of Appeals for Mahoning County affirmed a lower court ruling upholding the rezoning, but unfortunately failed to discuss the propriety of the restrictive covenant condition.[30]

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[23] *Id.* at 274.

[24] *Id.* at 274.

[25] W. Miller, *The Current Status of Conditional Zoning*, 1973 SW. INST. ON P., Z., AND E.D. 131, 141 (1974).

[26] E. Schaeffer, *Contract Zoning and Conditional Zoning*, 11 PRAC. LAW. 43, 49 (1965).

[27] *Id.*

[28] 74 Ohio L.Abs. 482 (Ohio App. 1955), *appeal dismissed for want of a debatable question*, 164 Ohio St. 393 (1955).

[29] *Id.* at 484.

[30] *Id.* at 489.

More recently, a Court of Appeals addressed itself more directly to the legality of a somewhat unusual restrictive rezoning technique. In *Hausman and Johnson, Inc. v. Berea Board of Building Code Appeals*,[31] certain landowners in 1963 sought and obtained the rezoning of a parcel from a residential to a retail business classification. An ordinance in effect since 1941 mandated that rezoning applicants state their reason for seeking a less restrictive use and agree to begin that use within twelve months or face an automatic reversion to its former use.[32] Notwithstanding that ordinance, no evidence was presented in the *Hausmann* case that the applicants represented at the time of rezoning that the property would be used for a particular purpose, or that they agreed that if the land were not devoted to a specified use within twelve months of the rezoning, the property would automatically revert to its original residential zoning classification.

The rezoned land remained vacant, and a corporation (the "optionee") obtained an option to purchase the property for the purpose of constructing a drive-in restaurant. A real estate firm, acting for the optionee, applied for a building permit, which was denied by the building commissioner based upon a 1970 ordinance purporting to declare a moratorium on the construction of drive-in restaurants. By reason of still another ordinance requiring the planning commission to approve site development plans for such retail business uses, the owners applied for such approval, and the planning commission denied the building permit application on the ground that the development was prohibited by the drive-in restaurant moratorium ordinance. The owners responded by appealing the decisions of the building commissioner and the planning commission to the board of zoning and building code appeals. The appeal was denied, and the owners filed suit in the common pleas court against that board. Simultaneously, the owners, the optionee and the real estate firm filed a complaint for declaratory judgment and equitable relief against the building commissioner and the members of the planning commission. This suit contested the constitutionality of the moratorium ordinance.

Although the issue was not raised prior to the filing of the lawsuits, the defendants contended before the common pleas court that the property had automatically reverted to its original residential zoning because the land had remained vacant for more than twelve months from the 1963 rezoning action. Plaintiffs prevailed in both actions, and defendants appealed both decisions to the Court of Appeals of Cuyahoga County.

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[31] 40 Ohio App. 2d 432, 320 N.E.2d 685 (1974).

[32] BEREA, OHIO, ORDINANCE 627 (1941).

In the court of appeals the defendants-appellants abandoned their reliance on the moratorium ordinance, and contended that the "zoning by agreement" ordinance was valid, thus "[arguing] the legal effect of conditional zoning."[33] Plaintiffs-appellees argued, among other things, that the "zoning by agreement" ordinance was invalid for two reasons:

> It purports to authorize conditional rezoning, and it purports to authorize the automatic repeal of the amended ordinance and the automatic reenactment of the former ordinance without regard to the procedural requirements of the law.[34]

In their briefs, all parties agreed that these issues were matters of first impression in Ohio.[35] Appellees cited cases in other jurisdictions that had invalidated conditional rezonings, all of which were either accompanied by agreements or subject to automatic reverter provisions.[36] Appellants contended that rezoning ordinances authorizing use conditions and automatic reversions were permissible, because of analogies to other land use controls techniques. More specifically, since conditions are permissible in connection with conditional use and variance approvals and a permit issued pursuant to a conditional variance may lapse automatically when the conditions are not met, then such approaches should be equally legal in rezoning cases.[37]

In holding invalid both the ordinance restriction binding the owners to particular uses and the reversion which appellants attempted to enforce, the court of appeals relied on the traditional arguments against contract zoning:

> 1. An agreement between a property owner and a municipality binding the property owner to a particular use as a condition for rezoning without reversion to the original zoning is against public policy and invalid. An ordinance purporting to effect such an agreement by operation of law is also against public policy and invalid.

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[33] 40 Ohio App. 2d 432, 437 n.8, 320 N.E.2d 689 n.8 (1974).

[34] Brief for Appellees at 8, Hausman and Johnson, Inc. v. Berea Board of Building Code Appeals, 40 Ohio App. 2d 432, 320 N.E.2d 685 (1974).

[35] Brief for Appellants at 5, Hausmann and Johnson, Inc. v. Berea Board of Building Code Appeals, 40 Ohio App. 2d 432, 320 N.E.2d 685 (1974); Brief for Appellees at 8, Hausmann and Johnson, Inc. v. Berea Board of Building Code Appeals, 40 Ohio App. 2d 432, 320 N.E.2d 685 (1974).

[36] Oury v. Greany, 267 A.2d 700 (R.I. 1970); Houston Petroleum Co. v. Automotive Products Credit Association, 87 A.2d 319 (N.J. 1953); and Baylis v. City of Baltimore, 219 Md. 164 (1959).

[37] Brief for Appellants at 7-8, Hausmann and Johnson, Inc. v. Berea Board of Building Code Appeals, 40 Ohio App. 2d 432, 320 N.E.2d 685 (1974).

2. Zoning agreements with reverter provisions conditioning rezoning are invalid because such agreements (a) attempt to control municipal legislative authority by contract; (b) may constitute zoning without regard to public health, safety and welfare; (c) may demonstrate a lack of concern for the comprehensiveness basic to planned land use; and (d) infuse a particular zone with a quality of vagueness because the contractual restrictions will depend upon extrinsic evidence.[38]

The holding does not apparently invalidate rezoning "accompanied by, but ostensibly not involving, a side contract with conditions for improvements to be made by the property owner."[39] Nor should it be construed as invalidating "conditional rezonings" where the legislative body unilaterally imposes conditions pertaining to use or other aspects of development where there is no agreement between the applicant and the legislative body. Hence the implicit holding in *Johnson v. Griffiths*,[40] that a local government may legally order the applicant to record a restrictive covenant limiting the permitted uses of the parcel, appears to be unaffected by *Hausmann*.

In 1963 the Ford Foundation awarded a large grant to the American Law Institute to study current land use legislation and to prepare a model enabling law on that subject. Article 2 of the Model Code[41] evidences a basic regulatory philosophy that "most land development decisions today are the result of an exercise of discretion and are made on an *ad hoc* basis, usually in response to a developer's proposal."[42] In keeping with that philosophy, the Model Code authorizes a system under which a local government, administrative official, or planning commission could impose conditions on rezonings, and building and zoning permits.

The Model Code introduces a number of new terms to the development control process. A "Land Development Agency" means the local governing body itself, or any committee, commission, board, or officer of the local government, upon which the authority has been conferred by the local ordinance to make particular land use decisions.[43] A "development permit"[44] includes the act of rezoning by the

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[38] 40 Ohio App. 2d 432, 439, 320 N.E.2d 685, 688 (1974).

[39] 40 Ohio App. 2d 435 n.3, 320 N.E.2d 687 n.3.

[40] 74 Ohio L.Abs. 482 (Ohio App.), *appeal dismissed for want of a debatable question*, 164 Ohio St. 393 (1955).

[41] A.L.I. *Model Land Development Code*, Proposed Official Draft, adopted May 21, 1975.

[42] C. Fox, *A Tentative Guide to the American Law Institute's Proposed Model Land Development Code*, 6 THE URBAN LAWYER 928, 931 (1975).

[43] A.L.I., *supra* note 41, at § 2-301 n.43.

[44] *Id.* § 1-201 (2).

local government.

Section 2-312 governs "special amendments" which "will primarily be 'rezonings' of individual parcels at the owners' request."[45] While no preliminary versions of that section explicitly permitted the local governing body to impose conditions on such special amendments,[46] the final draft approved by the A.L.I. remedied that defect, providing that "the governing body may attach conditions that could have been attached to a special development permit use under § 2-103.[47] Under the model code, when the local government approves rezoning, it issues a "Special Development Permit"[48] to which it may attach conditions concerning any matter subject to regulation under the Model Code, unless the local ordinance provides otherwise. The official notes to Section 2-103 give three examples of authorized conditions: (1) conditioning the issuance of a special development permit upon a "site plan review by the planning staff of the detailed plans and specifications," (2) requiring a developer to set up mechanisms for future maintenance of the property, such as a homeowners' association, and (3) in a case where "a developer persuades the Agency to allow a gasoline station by promising to build an office building next door as a buffer", requiring that the office building be constructed first.[50] Apparently designed principally to relate to subdivision controls but having a potential impact on zoning as well, Section 2-103 (3) provides for limitations on the authority to condition the grant of a permit on the payment or conveyance of money, land, or other property. Such conditions are permissible only in certain cases and only if the ordinance authorizes them.[51] Because an administrative official, committee, commission or board may also be "Land Development Agencies," the Code authorizes the local government to empower one or more of them to act in development permissions, and to attach conditions to such permits or actions.[52]

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[45] *Id.* § 2-312 N.

[46] *See, e.g.*, A.L.I., *Model Land Development Code*, P.O.P. No. 1, § 2-312, adopted May 25, 1974.

[47] A.L.I., *supra* note 41, at § 2-312(3) n.43.

[48] Professor Fox correctly notes that special development permits are the heart of the sophisticated regulatory techniques authorized by the Code. A.L.I., *supra* note 41, at 932 n.44.

[49] A.L.I., *supra* note 41, at § 2-102(2) n.43.

[50] *Id.* § 2-103.

[51] *Id.* § 2-103(3).

[52] One of the policy judgments implicit in the Model Code is that a local government should have the authority to delegate many decisions to administrative officials or bodies. The Principal Reporter has remarked that under the Model Code:

> We enable, as does the existing law, a local government to set forth the restrictions on development in the ordinance by prescribing the development which a land

III. Developer Representations in Toledo and the Need for a Restrictive Rezoning Development Approval Technique

Representations of the intended use or proposed features of the proposed rezoning are made by the developer at a number of stages in the processing of a rezoning. The first opportunity is at the preliminary conferences between the developer and the planning staff where the applicant makes an informal presentation concerning the planned development. Occasionally, the developer's representations take the simple form of a verbal description of a proposed use; however, it is not uncommon, especially where the project is large, for the applicant to present more detailed data such as architectural plans and renderings, photographs, and identification of potential users. The purpose of such representations is to persuade the staff members, upon whom most plan commissions rely, that a rezoning would be appropriate.[53]

Representations are not uncommon at another typical stage of the developer's campaign for rezoning—meetings with neighboring property owners. At these meetings the applicant hopes to "neutralize the opposition" so as to avoid the creation of political pressures adverse to the proposed zone change.[54] Finally, representations are

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owner cannot undertake as of right; and we also authorize the local government to entrust a larger number of discretionary decisions to the zoning administrative agency.

Finally, the decision may be challenged in judicial review in much the same way that federal and state administrative decisions are challenged. We specify a broad list of persons and organizations entitled to participate in the administrative process—the developer, the neighbors and other governmental and private organizations, and we further specify a broad category or persons entitled to challenge the decision in court. To protect a permit at the earliest practical time, and to protect the community we restrict the number of times the disgruntled developer can come in with essentially the same application, after having lost once before.

A. Dunham, *The A.L.I. Model Land Development Code*, 7 Real Property, Probate and Trust J. 510, 513 (1973).

[53] San Antonio attorney John W. Davidson has emphasized the significance of these early efforts at persuasion:

> The first step, if possible, is to convince the zoning administrative staff members of the reasonableness of the zone change application and to obtain their support and sympathy for the approval of the application. The zoning administrative staff members are the trained professional personnel who administer and enforce the zoning code and regulations. The appointed or elected public official who sits as a member of the zoning regulatory body, because of time limitations, necessarily must give weight to the recommendations and opinions of the zoning administrative staff members. A favorable recommendation from the staff for your client's zone change application is a foot in the door toward approval of the application. A negative recommendation, on the other hand, is a persistent roadblock in the way of approval.

J. Davidson, *Zoning Applications—Planning and Executing the Campaign for Approval*, 1972 Sw. Inst. on P., A., and E.D. 47, 57 (1973).

[54] Another homework assignment of equal importance is to neutralize the oppo-

formally made at hearings where the developer attempts to persuade the plan commission to recommend, and the city council to approve, the rezoning. One experienced zoning attorney advises flexibility at such hearings:

> [B]e ready to make any concessions you have anticipated and are authorized to make. The zoning regulatory members would like everyone satisfied, if possible. If you are prepared and willing to make concessions on protective screening and buffer zones, your attitude and position will appear to be reasonable and may well be the deciding factor for approval of (the) zone change application.[55]

Assuming the city elects to allow such presentations, attention should be directed to possible techniques by which the city can bind developers to their representations. Restrictive rezoning/development approval techniques can operate to bind the developer to this own representations and to restrictions imposed by the local government.

During the summer of 1974 this author designed a limited empirical research project to test the effect of representations made to the planning commission by applicants for rezonings in Toledo, Ohio. Because the Toledo zoning ordinance does not confer authority on the city council to impose conditions when rezoning, the study focused on: (1) the extent to which rezoning applicants attempts to induce the plan commission to approve rezoning requests by making representations as to the intended use or proposed features of the proposed use; (2) the indicated impact of such representations on plan commission and city council actions; and (3) the rate of compliance with the stated representations, in cases where the rezoning had been granted.

A careful review was conducted of all rezoning cases reflected in the minutes of the plan commission's hearings between June 1, 1971 and May 31, 1972, (the "sample period"). The sample period

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sition. Often, opposition to zone change applications stems from either lack of communication or from faulty communication. Resident Neighbor A hears that if the zone change application is approved, the applicant can sell beer. By the time the information filters down to Neighbor D, he is told that if the zone change application is approved, there will be beer drinking, topless go-go dancers, and carousing around. If the zone change application will permit only off-premises consumption of beer, then there has been a lack of communication. For this reason the applicant should arrange for a meeting with the surrounding neighbors to explain the proposed use for the property and to point out the safeguards that will be provided to protect the adjoining neighbors' properties. The presence of the architectural or engineering consultant and attorney at these meetings is desirable as they tend to make the applicant's "promises" more official.

Id., at 58.

[55] *Id.* at 59.

was selected on the assumption that most of the contemplated development would have occurred by the summer of 1974. Additionally, the minutes of the city council hearings were reviewed in cases where the city council approved a request for rezoning despite the fact that the plan commission had recommended disapproval. For purposes of the study, the term "represention" was deemed to mean any statement made by the applicant or his representative/attorney as to the intended use of the parcel subsequent to the requested rezoning or as to any other aspects of development which might be construed as an assurance pertaining to contemplated development. The term "companion case" was defined as a request for a subdivision plat approval,[56] special use permit,[57] or planned unit development approval

[56] A subdivision plat is a map generally showing blocks, lots, streets, alleys, utility easements, and other public facilities, required to be approved by a local government prior to recordation by a "subdivider." A "subdivider" is defined generally in Toledo as an owner dividing any parcel of land shown as a unit or as contiguous units on the local tax rolls, into two or more lots, sites, or parcels of certain minimum sizes for purposes such as transfer, or which involve public facilities or common open space in relation to the construction of structures. RULES AND REGULATIONS OF THE TOLEDO CITY PLAN COMMISSION GOVERNING PLATS AND SUBDIVISIONS 4 (1965). *See generally* OHIO REV. CODE §§ 711, 713 (Page 1954). Subdivision controls are designed principally to ensure adequate public facilities (*i.e.* sewers and streets) in connection with private development. By contrast, zoning controls traditionally restrict uses and the specific development plan of the project. *See generally* Flynn, *Practical Problems of a Subdivider's Counsel in Creating a Subdivision*, 17 PRAC. LAWYER 44 (1971); Reps and Smith, *Control of Urban Land Subdivision*, 14 SYRACUSE L.REV. 405 (1963). In Toledo, the City Plan Commission pursuant to Toledo City Charter ch.10 § 189-190 (1959) acts on requests for subdivision plat approvals, but it only makes recommendations to the city council concerning rezonings.

The plan commission generally approves plat drawings subject to conditions recommended by reviewing city agencies with jurisdiction over such public facilities as water supply, sewers, and streets. In one recent case, the staff and plan commission recommended approval of a plat subject to several conditions: 1) prior approval of a site grading plan relating to storm runoff; 2) installation of footing tile outlets for most lots; 3) installation of sidewalks and curbs at specified locations; and 4) a grant of a long term easement by the owner of one lot for parking and driveway purposes, the terms thereof to be approved by the City. *Hearings on the Preliminary Drawing of Proposed Plat, Reference S-3-75, Before the Toledo City Plan Commission*, (May 1, 1975).

[57] In Toledo, "Special Uses" are those uses permitted only when approved in advance by the City Council pursuant to Section 9-20-1 of the Toledo Municipal Code. The special use procedure is designed for giving individualized treatment to particular cases, in contrast to a pre-determined "districting" approach. Some years ago, the special permit technique was used almost exclusively for allowing several types of land use which were potentially incompatible in all zones, rather than for uses which are not potentially incompatible in all zones, but only in one particular zone. The trend in many jurisdictions, however, has been to expand the number of special uses allowed in one or more zones. In many respects, Toledo has participated in this trend.

Conditions or restrictions on the construction, location and operation of a special use may be recommended by the plan commission and imposed by the city council, in order "to secure the general objectives of (the ordinance) and to reduce injury to the value of the property in the neighborhood. TOLEDO, OHIO, MUNICIPAL CODE § 9-20-2(3) (1959).

(in Toledo, a "C.U.P."),[58] considered by the commission in conjunction with the request to rezone the parcel where the governing ordinances permitted the imposition of conditioning on the rezoning.

During the sample period forty-five rezoning cases were heard by the plan commission. Of the forty-five cases heard, thirteen involved companion cases, and in three cases the petitioner was the local Urban Renewal Agency. The applicant made representations in one-third or fifteen of the cases. Because of the relatively small sample, results and the conclusions of the study are highly tentative and are not supported by quantitative "proof."

During the sample period, the plan commission staff recommended that the plan commission approve eighteen of the forty-five applications, a forty percent "approval recommendation rate." The plan commission itself recommended that the city council approve nineteen of those applications. The city council ultimately approved fifty-one percent of the requests, thereby disagreeing with the plan commission in nine percent of the cases. Interestingly, those rezoning cases which were accompanied by a companion case allowing greater control over the character of the development had a higher approval rate: of thirteen such cases, six or forty-six per cent received a recommendation of approval from the plan commission staff; nine or sixty-nine per cent received a recommendation of approval from the plan commission, and nine or sixty-nine per cent were finally approved by city council.

Conversely, where the requested rezoning was not accompanied by a companion case permitting the imposition of conditions and requiring submission of a site plan for the parcel, the rate of approval was lower: of twenty-nine such cases, nine or thirty-one per cent were recommended for approval by the staff; seven or twenty-four per cent were recommended for approval by the plan commission; and eleven or thirty-eight per cent were approved by city council.

Applicants who made representations relating to developments

In acting on requests for gasoline service station special use permits under TOLEDO MUNICIPAL CODE § 9-20-1(2)(q) (1959), the plan commission often recommends approval, but subject to such conditions as:

> Construction in accordance with a specific site plan; prohibitions on tune-up, general repair, auto wash and storage operations; mandatory relocation of signs and lights upon city acquisition of additional rights-of-way; approval by the Plan Director of fencing and planting plans; and posting of a performance bond to insure compliance with curbing, planting, and fencing plans. No building permit is issued until all such conditions are met.

See Resolution No. 49-75 Before the Toledo City Plan Commission (May 1, 1975).

[58] Cases cited note 22 *supra*; TOLEDO, OHIO, MUNICIPAL CODE § 9-20-3 (1959).

that were not also the subject of a companion case fared better than applicants who had not made representations: of fifteen cases involving representations, five or thirty-three per cent were recommended for approval by the plan commission staff; six or forty per cent were recommended approved by the plan commission; and eight or fifty-three per cent were approved by city council. Representations where the request was not also the subject of a companion case were common: in slightly more than fifty per cent of those cases the applicant made at least a representation concerning the contemplated use. Also, the rate of recommended approvals by the plan commission was sixteen per cent greater in cases involving representations than the rate of approval for all cases without a companion case.

Of the eight requests involving representations and granted by the council, construction had been completed by August, 1974 on seven of the rezoned parcels. One of the rezoned parcels remained vacant at the time of the site check with no apparent preparation for construction. Each of the seven completed construction parcels were found to be in general conformity with the applicant's prior representations.

Interpretation of the data is difficult because of the small size of the sample and the disparity between the merit and appropriateness of particular proposals. However, it appeared that both the staff and the plan commission tended to be somewhat reluctant to recommend approval of a rezoning request unless the city was able to exercise some control over the actual development, especially if the control was in the form of site plan review and the imposition of conditions. The rate of approval in cases involving a companion case was forty-five per cent greater than the rate of approval for cases without a companion case and not involving the Urban Renewal Agency.

Discussion in certain of the plan commission minutes indicates that the commissioners were aware that under the ordinance they had no authority to impose conditions in connection with a rezoning, and that once a rezoning occurred the applicant was at liberty to introduce any of the several uses allowed by the ordinance in the use district, notwithstanding any contrary representations he may have made before the commission. In one case, for example, an applicant requested a rezoning to C-3 Commercial so as to permit the development of a neighborhood ice cream and hamburger parlor. The plan commission chairman expressed his disfavor with the proposed change "because you can get a beer spot" in a C-3 zone. The appli-

cant stated his willingness to restrict the permitted uses to exclude the sale of alcoholic beverages. However, the plan commission still recommended disapproval of the request.[60] The would-be operator of the ice cream parlor was presumably unable to satisfy the commission chairman that a prohibition of retail sale of alcoholic beverages could be legally imposed in connection with the rezoning. Perhaps he would have been successful had the zoning ordinance permitted enforceable conditions to be imposed.[61]

"Assurances" by the applicant or his attorney were often considered by the commission but the problem of the enforcement of these assurances did not go unnoticed. Consider, for example, a January, 1972 plan commission hearing to consider a request for rezoning of contiguous parcels from C-3 General Commercial and R-3 Residential to R-4 High Density Residential, to permit development of a

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[60] *Id.*

[61]

COMMISSION CHAIRMAN:	Does the Commission have any questions on this [request]?
COMMISSIONER:	Why can't we have a plan showing what they want to develop here? We will just give them a blanket check to build anything they want to develop here, under the (C-2) application.
COMMISSIONER:	I do feel the people backing up to this property would like to know what is going to be there. They have a right to know. I think we should consider the people in the area. If they are going to put an office building in there, I have no objection to a medical clinic or whatever they want to put in, but to turn it over and be another driveway for any other thing which can be built in C-2, I just wondered.
PLANNING DIRECTOR:	The original request on this piece was for C-3 which the staff would not go along with. They revised their resolution (sic).
COMMISSION CHAIRMAN:	They could put it in here, (in a) C-2 Restricted Office District. We could have a drive-in bank.
PLANNING DIRECTOR:	The point of the whole thing is we are requesting a site plan. There is nothing in the zoning ordinance for that. Consider this on the uses allowed in the C-2 District. Make a decision whether C-2 uses are good zoning or not good zoning. Not on a picture someone will bring in. A pretty structure does not mean anything more than what it is drawn on.
COMMISSIONER:	The minute we approve it on C-2 use, anything in that use can be built there.
PLANNING DIRECTOR:	That is regardless whether you have a site plan for it or not. Because you cannot condition your zoning on that.

In the Matter of Dunbar, February 3, 1972 TOLEDO CITY PLAN COMMISSION No. 2-371-71.

federally subsidized home for the elderly. The attorney for the applicant presented a sales and operation agreement, a design rendering, and a letter from the city forestry division stating its willingness to accept the applicant's dedication of one acre of the parcel for park purposes. He also expressed a willingness to comply with certain recommendations of the city engineer pertaining to sewers. The applicant's attempts to assure the commission and neighbors present at the hearing, that the development would actually proceed as represented, were met by laughter from the audience.[62] He and his attorney then traced a long series of neighborhood meetings, which had produced substantial accommodations, and they argued forcefully that the developer had kept his unenforceable promises on previous occasions, and had an incentive to do so this time because he would be requesting other rezonings in the future.[63]

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[62] In the Matter of Spieker, January 20, 1972 TOLEDO CITY PLAN COMMISSION No. 2-363-71.

[63] *Id.*

APPLICANT:	You have had my personal assurances before. If this project does not get developed, cannot be financed, falls apart, I will come back in here and you can rezone it back the way it is today. If you would like me to put it in writing, post a bond, I would be happy to do it.
COMMISSIONER:	I do not object to your integrity—it is good. These are things I like to bring out in these meetings. I know there must be people present opposed to this application; I do not know; but truthfully, I would like to see this project go ahead; this project and not some other project.
APPLICANT:	I first got involved in this in the fall of 1968. At that time I requested C-3 zoning for the entire parcel, you may recall. Naturally it brought out a lot of opposition. At City Council it was suggested to meet with the neighbors to develop the type of project the neighbors would like; work with them. We had a meeting with the neighbors and no one wanted anything to overtax the schools, sewers and streets. This is the only kind of thing which would meet the criteria.
ATTORNEY FOR APPLICANT:	There are not any people involved in zoning more aware of what happens. We have tried to put stipulations in deeds but legally it cannot be done, so when I met with (the applicant) and several of the neighborhood people in favor of this, I was given every assurance that this was what will be asked for. There is no reason he will not do this. He will not sell his integrity down the river, merely to get a project started. I feel (the applicant) should be given every benefit of fulfilling his word. As he says, if it does not

Attorneys for developers occasionally have demonstrated considerable ingenuity in attempting to make their assurances binding and hence persuasive. In one case the plan commission considered an application to rezone a one and three quarters acre parcel from single family residential to general commercial. Two years earlier, the commission had voted to defer the request pending the approval and recordation of a single family subdivision plat for a large portion of the applicant's property fronting on a residential street[64] "as a condition to the application for rezoning" and in order "to create a residential buffer." At the first subsequent hearing, several commissioners expressed their desire to insure that no off-street commercial parking would be permitted on the property fronting the residential street. An attorney representing surrounding residential owners stated that he could not "see the rezoning of this parcel without positive assurance against off street parking . . . it can be done legally through deed restrictions."[65] The attorney for the developer stated that his client "is willing to do whatever has to be done to obtain the rezoning."[66]

> go through we will come back and have it rezoned back. You have my professional word on this, also. That is how certain I am that the project will go through—this type of project. I feel the neighbors have every right to object to any other type of project. I do not think it would take a different type of project. I think we ought to be given the opportunity to do as we say we will.

[64] In the Matter of Green Bush Knolls, July 24, 1969 TOLEDO CITY PLAN COMMISSION No. 2-155-69.

The recordation of a subdivision plat has been required in another commercial rezoning case. In that case there was a risk of undesirable strip commercial development of a seven acre parcel perceived by the planning staff and plan commission which was resolved when the commission recommended rezoning to take effect only upon the recordation of a plat with approved site plan. There, an applicant requested a rezoning from C-2 (Restricted office) to C-3 (General Commercial) but was faced with a staff recommendation of disapproval because platting or other site plan approval was not possible.

Responding flexibly to that recommendation, the applicant's attorney requested and received from the plan commission a deferral of consideration pending the preparation and submission of a site plan, and three months later the commission approved a preliminary drawing of a proposed subdivision plat for the parcel. One month later the case was again considered by the commission, which accepted the staff's recommendation to

> Approve the C-3 requested zoning as it is considered not unduly detrimental to the existing and future development of the area and would be an extension of existing C-3 zone. It is recommended that the C-3 zoning become effective at such time as a final plat for the area is recorded.

In the Matter of McCarthy, November 1, 1971 TOLEDO CITY PLAN COMMISSION No. 2-142-71.

[65] In the Matter of Greenbush Knolls, July 1, 1971 TOLEDO CITY PLAN COMMISSION No. 2-155-69.

[66] *Id.*

The commission deferred the matter at the request of the applicant pending the filing of a deed restriction prohibiting off street parking.[67]

At two subsequent hearings, the applicant appeared to protest the commission's requirement of a deed restriction, arguing that the neighbors were no longer objecting because the applicant had given assurances that he had no present intention of using any portion of the property for commercial off-street parking and that if the property were ever to be used for such parking, a six foot fence would be installed.[68] At the second such hearing, the city's assistant law director, who had been contacted by the applicant's attorney, offered his opinion that the commission had no authority to "request an agreement or promise or covenant from the owners in respect to either part of this parcel sought to be rezoned, that no request would ever be made for off street parking . . . ."[69] The chairman of the commission, himself a lawyer, suggested that "even though the Commission cannot work out something on a contractual basis, the property owners can make restrictions between themselves."[70]

The applicant's attorney offered to record a written agreement between the applicant and the principal adjacent landowner to construct a six foot solid buffer fence in the event that any portion of the parcel was ever used for commercial off street parking after the requested rezoning was granted. One non-lawyer commissioner contended that such an action would constitute illegal "contract zoning," to which the applicant's attorney replied that "it was [our] intention to record the agreement; it was a matter of timing."[71] The commission voted three to one to recommend approval of the request.[72]

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[67] *Id.*

[68] In the Matter of Greenbush Knolls, July 5, 28, 1971 TOLEDO CITY PLAN COMMISSION No. 2-155-69.

[69] In the Matter of Greenbush Knolls, July 28, 1971 TOLEDO CITY PLAN COMMISSION No. 2-155-69.

[70] *Id.*

[71] *Id.*

[72] Additional examples of representations are also worthy of note:

(a) An applicant for a rezoning to a C-3 Commercial appeared at the Plan Commission hearing and explained simply that "an out-of-town nursery has looked at the location and we have been talking to many prospects." The commission, following the recommendation of its staff, recommended disapproval. However, the city council granted the rezoning, after hearing from the applicant that a fish-and-chips business was "interested" in the site, that he had talked with other prospects, but that none had indicated definite interest. He indicated that a nursery and a restaurant were "possibilities," but that he would not put in a "string of fast food operators", and that he was interested in introducing a commercial use that would complement the surrounding industrial uses. In the Matter of Arco Realty Co., June 3, 1971 TOLEDO CITY PLAN COMMISSION No. 2-107-71.

IV. AKRON: "LIMITED USE PERMISSION" BY THE CITY COUNCIL

During the period January, 1965 through July, 1971, more than ninety per cent of the petitions to permit more intensive land use in Akron were approved by the city council.[73] Planning staff members stated to this author that a similar approval rate prevailed in 1974, and that "virtually all" approved requests are voluntarily filed and processed as "limited use permissions"[74] rather than rezonings.

The limited use permission device is referred to in the ordinance and by participants in the zoning process by the designation "conditional zoning." Unlike traditional conditional zoning, "the existing zoning classification of an area is not changed . . . (rather) the uses subject to conditions set forth and imposed shall be a special development provision . . . ."[75] To avoid confusion, the technique will be referred to here as limited use permission.

Under the limited use permission procedure, an applicant requests permission to use land for a "less restrictive use" than permitted under the existing zoning regulation. Such permission may be granted by the council, subject to appropriate "conditions, limitations, and stipulations as are established by the Planning Commission and Council."[76] The high percentage of less restrictive zoning approvals is due largely to the frequent use of this technique, which affords the council flexibility in mitigating potentially adverse "spill-over" effects of use changes.

The utility of any zoning technique depends in large measure on its administration. In Akron, a prospective applicant for rezoning is usually counselled by the planning staff that the city encourages applicants to file under the limited use provision and that the council is generally reluctant to grant "straight rezonings" without conditions.[77] Applicants and staff normally hold one or more informal pre-filing conferences to discuss conditions that the staff might recommend.

(b) The staff, Plan Commission and Council approved a rezoning to the M-1 industrial district where the applicant, a major local employer, stated before the Commission that the parcel would be used to provide off-street parking for its employees, and that it had "provided for what we consider an attractive screening and an aesthetically pleasing parking lot which will be under surveillance." In the Matter of Champion Spark Plug Co., July 27, 1971 TOLEDO CITY PLAN COMMISSION No. 2-166-71.

[73] D. Smith, *A Wad of Cash—and an Amazing Record*, Akron Beacon Journal, July 6, (1971).

[74] AKRON, OHIO, ZONING CODE § 1775.071 (1959).

[75] *Id.* at § 1773.071 (F).

[76] *Id.* at § 1773.071 (A).

[77] Rezonings are governed by Chapter 1713 of the Ordinance.

Termed "negotiations" by many persons interviewed, these exchanges are understandably regarded by developers as an essential element of the approval process.

The prescribed petition for a limited use permission requires (in addition to descriptive and identification data) certain "supporting information" including both "plot plans for the proposed use showing location of building(s), parking, loading areas, traffic access and circulation drives, open space, landscaping, utilities, signs, refuse and service areas, and elevations"[78] and "a letter of narrative statement relative to the above requirements and also explain[ing] the economic impact and mitigation of noise, glare, and odor effects on the adjoining property, and general compatibility with adjacent and other properties in the district."[79] This "supporting information" relates to those aspects of the proposal that might have adverse impact on the surrounding area. These are the aspects to which conditions might be imposed if the limited use permission is granted.

After the request is filed, it is circulated among various potentially effected city officials and agencies, public utility companies, and the like. The planning staff frequently invites such parties to coordination and evaluation meetings in order to discuss the impact of the proposal and appropriate conditions. Although no change in the underlying zoning classification of the site occurs upon the grant of a limited use permission, the criteria to be applied by the planning commission reflect traditional rezoning considerations. Thus, the relationship to the physical plan for the city; the need for such facilities at the proposed site and in the city generally; the economic and market impact on the neighborhood, the community and the city; the effect on the traffic and transportation plan as well as on the surrounding uses and the neighborhood; and other factors that reflect the public interest are considered by the planning commission.[80] In order for the council to be sufficiently informed to act upon the request, the ordinance requires the planning commission to transmit to the council certain documentation: a copy of the proposal; the reports and recommendation of the planning staff; substantive reports of city departments and utilities; relevant extracts of minutes of the planning commission hearing; and other data and material pertinent to the issues.[81]

Enforcement of any conditions imposed by the council in

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[78] Petition for Conditional Zoning, issued by the City of Akron Planning Staff.

[79] *Id.*

[80] AKRON, OHIO, ZONING CODE § 1773.071 (B) (1959).

[81] *Id.* at § 1773.071 (C) (2).

connection with the grant of a limited use permission occurs when the developer seeks necessary permits: "before grading or building permits may be issued, the revised plans, bond and required approvals must be furnished by the applicant."[82] Revised plans may be required if one of the imposed conditions is the submission to and approval by the planning commission of "detailed site plans," indicating "the existing and the proposed facilities to be installed to alleviate adverse affects on the neighbors, such as, but not limited to, fencing, walls, landscaping, etc."[83] Another standard condition is that such improvements to be installed and maintained as shown on the approved plans.[84] The reference in the ordinance to the furnishing of a bond prior to the issuance of a building or grading permit supports one of the routine conditions that, "in order to insure development as shown on the approved plans," a performance bond must be tendered to the planning staff that is sufficient to cover the entire estimated cost of landscaping, hardsurfacing, or other special installations.[85] The specified approvals required to be submitted by the applicant prior to the issuance of a building permit normally include approvals from: (1) the city engineer, for driveway and parking areas plans; (2) the traffic engineer, for the location and sizes of points of ingress and egress; and (3) the planning staff, for minor changes of the structural and layout plans, construction material of exterior walls, and number, size and location of exterior signs.[86]

Some time prior to December, 1969, the owners of 14 acres of land fronting on a four-lane major Akron thoroughfare and Federated Department Stores, Inc., an optionee of the property (the store) filed a request to rezone the site to a retail business zoning classification to permit the construction and operation of a discount department store. A six month application processing period was characterized by recurring applicant-staff negotiations, and several appearances before a number of officials and bodies—a hearing examiner, the planning commission, the board of zoning appeals and city council. In apparent response to concerns expressed at initial hearings, the applicants amended their rezoning request to one for a limited use permission, which was ultimately approved by the city council, subject to extensive conditions.

The case provides an excellent illustration of the operation of the

[82] *Id.* at § 1773.071 (D).
[83] Undated list of Standard Conditions, published by the City of Akron Planning Staff.
[84] *Id.*
[85] *Id.*
[86] *Id.*

limited use permission technique and warrants detailed examination. Potential traffic problems associated with the store's proposal were the principal topics at a December, 1969 hearing conducted by a planning commission hearing examiner, a member of the commission appointed to hear the case. The applicant's attorney[88] acknowledged that the proposed development would generate an additional 1000 automobile trips per day in the area and that "this traffic problem has to be handled."[89] He requested that the examiner defer her recommendation until a particular consulting traffic engineering study was submitted, and in the alternative he stated that he "would be agreeable to conditional zoning with a condition that the traffic problem is to be solved."[90] The examiner deferred further consideration for three weeks and recommended that the applicants consult with the planning staff regarding "additional questions and [to] discuss what plans are required."[91] In her report to the planning commission, the hearing examiner expressed dissatisfaction with the applicants' failure to present a detailed site plan or narratives relating to resolution of traffic problems, character of business, and other matters.[92]

On January 9, 1970, the hearing examiner recommended that because of the importance of the matter, further hearings should be conducted by the full commission.[93] This recommendation was unanimously approved, and on January 30, 1970, the commission considered the store's proposal. By this time the matter was presumably

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[87] AKRON, OHIO, ZONING CODE § 1773.071(D) (1959).

[88] The attorney for the applicants was apparently an active zoning lawyer in the city. The Akron Beacon Journal on July 6, 1971 ran an article reporting and commenting on results of a study conducted by it of every zoning case handled by the city council since 1965 (318 total cases). It reported that the attorney and the other three partners in his law firm represented clients in only 29 of those cases, but that their success rate at the city council level was slightly higher than that of all other attorneys. According to the article, ninety-three percent of their clients received rezonings from the council, as compared to ninety percent for all other attorneys. The attorney and his now partners apparently fared less well before the planning staff (forty-two percent recommendations for approval as compared to eighty-five percent for all other attorneys) and the planning commission (sixty-two percent approval recommendations, as opposed to ninety percent for all other attorneys).

One of the attorney's partners at the time of the Beacon Journal article was the local Democratic party chairman and the attorney himself had served as a finance chairman and fund raiser. A majority of the city council has been for many years, and was in 1971, affiliated with the Democratic party.

[89] *Hearings in the Matter of Federated Department Stores, Inc. Before the Planning Commission Hearing Examiner* (December 19, 1969).

[90] *Id.*

[91] *Id.*

[92] Report of the Hearing Examiner to the Planning Commission, quoted in Minutes of Hearing of the Planning Commission, January 9, 1970.

[93] *Id.*

well known, for at the January 30th meeting, among those attending were the president and four other members of the city council. Significantly, the proposal had been amended to a request for a limited use permission. The applicants' attorney presented a site plan and elevation study, as well as "conditions to which the (applicants) would be amenable."[94]

Principally because a traffic consultants' report was not ready, the commission voted to defer the matter.[95] On March 13, 1970, the planning commission again considered the application. At that hearing the applicants' attorney stated that the store was "agreeable to all safeguards and conditions (recommended by the staff)."[96] The commission voted unanimously to recommend approval of the request, subject to sixteen conditions, the first four of which related to the resolution of traffic problems. The first of these conditions required the store to reimburse the city for the cost of all street widening and other traffic related improvements as specified in a traffic survey commissioned by the store and approved by the planning staff. The second condition required completion of those improvements prior to the opening for business and the third required the dedication of up to a 15 foot deep strip of land fronting on the major thoroughfare to be widened and the reimbursement of the city for any expense involved in the acquisition of land to widen the street.[97]

In this case, by reason of another ordinance provision, the Akron Board of Zoning Appeals was also required to hear the matter. At the hearing held on April 10, 1970, the applicants' attorney noted his concern that one condition required completion of the street widening and improvement project prior to commencement of business. He argued that since the city was to construct the improvement, the store should not be prejudiced by any delay in completion of that construction. One staff member suggested that the board "could pass the matter as recommended, and before it goes to council, the staff could meet with (the attorney) and work out the change of language if necessary."[98] A board member added that "if the condition creates any great problem, (the attorney) could come back later requesting a release from (it)."[99]

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[94] *Hearings in the Matter of Federated Department Stores, Inc. Before the Planning Commission* (January 30, 1970).

[95] *Id.*

[96] *Hearings in the Matter of Federated Department Stores, Inc. Before the Planning Commission* (March 13, 1970).

[97] *Id.*

[98] *Hearings in the Matter of Federated Department Stores, Inc. Before the Akron Board of Zoning Appeals* (April 10, 1970).

[99] *Id.*

On June 23, 1970, the city council unanimously approved the request, subject to the conditions recommended by the planning commission and board of zoning appeals.[100] However, the opposition was prepared, for the very next day, nearby property owners filed a class action lawsuit for declaratory judgment and injunction on the grounds that the limited use permission ordinance passed by the council at the store's request was invalid and unconstitutional.[101]

The principal thrust of the suit was that the ordinance constituted impermissible "contract zoning" because the first condition to the approval required the city to widen and improve the major thoroughfare in consideration for the store's promise to pay for the improvement:

> When the City of Akron obligated itself to perform an inherently governmental function in response to a developers' offer to pay for it so that property wholly unsuitable for a proposed zoning can become suitable for such use, the passage (of the ordinance) which literally incorporated this obligation in its text, constituted contract zoning by bargain just as offensive in practical and legal effect as if the City had specifically contracted away its power to rezone.[102]

Plaintiffs did not seek to strike down the limited use permission ordinance in its entirety, and they acknowledged that zoning may be conditioned upon obligations of the property owner. But the plaintiffs contended that the defect in the present case was that the conditions were based upon the city's obligation to perform services on municipal property.[103]

The city based its substantive argument in large part on the "fairly debatable" rule; the legislative determination of the reasonableness of zoning ordinances must be upheld in any case in which the issue of reasonableness is fairly debatable.[104] After granting defendants' motion for judgment at the close of plaintiffs' case, the court rendered written findings of fact, including a finding that "whether or not the ordinance in question has a real or substantial relation to the public health, safety, or general welfare is reasonably debata-

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[100] *Hearing in the Matter of Federated Department Stores, Inc. Before the Akron City Council* (June 23, 1970).

[101] Schweikert v. Akron, No. 283701 (C.P. Summit Cty., Ohio June 24, 1970) (unreported).

[102] Plaintiff's response to Defendants' Reply Brief at 2, Schweikert v. Akron.

[103] *Id.*

[104] Willot v. Village of Beachwood, 175 Ohio St. 557 197 N.E. 200 (1964).

ble."[105] Among the conclusions of law were "(1) The subject ordinance under the evidence presented is neither contractual zoning or (sic) improper exercise of municipal authority."[106] As a result of this ruling, Akron will be able to maintain its highly successful method for coping with requests for high density rezoning.

V. CINCINNATI: COUNCIL REZONINGS TO "TRANSITION DISTRICTS" FOLLOWED BY DISCRETIONARY ADMINISTRATIVE REVIEW OF THE DEVELOPMENT PLANS

According to planning staff members, the Cincinnati ordinance contained a conditional zoning provision until the early 1960's, at which time a more limited technique was adopted—the "transition district." Used in circumstances involving planning considerations, distrust of a developer's intentions, and/or neighborhood objection, the system is more insulated from the political process than traditional rezoning. This is because the plan review and the imposition of conditions are the responsibility of an administrative official (the Director of Buildings), rather than the city council.[107] Some observers of zoning in Cincinnati feel that the previous conditional zoning process permitted political favoritism and encouraged undesirable *ex parte* contacts among developers, their attorneys, the planning commission, and the city council.

A "transition district" is in essence an overlay district imposed by council action on certain parcels in residential districts. The ordinance characterizes this limited overlay relationship as district (*e.g.* R-2) and sub-district (*e.g.* R-2(T)).[108] Conceptually, the system is designed to provide for the approval, subject to certain conditions, of development plans which would not normally be permitted in that

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[105] Judge's Findings of Fact and Conclusions of Law at 2, Schweikert v. Akron.

[106] *Id.*

[107] This official also acts on requests usually acted upon by administrative bodies such as the planning commission or board of zoning appeals. Thus, he hears and decides requests for conditional use permits (thirty-two hearings in 1973) and variances (ten hearings in 1973).

[108] CINCINNATI, OHIO, ZONING CODE §§ 802.2, 802.3.

> Sec. 802.2 Relationship to Other Districts. A T District is a sub-district of the R District of which it is a part, and all the regulations applicable in the R District of which it is part shall be applicable to the properties in the T District, except to the extent that they are modified by the Commissioner-of-the Buildings pursuant to the provisions of this Chapter. A T District shall be identified with the R District of which it is a part by an affix to the R District, such as R-1(T), R-2(T), R-3(T), and the like, through and including R-7(T).
>
> Sec. 802.3 A T District may encompass only the property in the R District which is or can be substantially affected by the uses permitted in the adjoining less restrictive district.

district but would be permitted in an adjacent district.[109] If the site "is or can be substantially affected by the uses permitted in the adjoining less restrictive district,"[110] then it may be regarded in planning terms as a transition or intermediate intensity area, wherein development of an intensity between that permitted on the site and on the adjacent or abutting land might be appropriate. This planning approach is reflected in a detailed procedure that involves the city council when it rezones to transition or "T" districts and the Director of Buildings when he hears and acts upon specific requests to permit development in such a transition district.[111]

The operation of the system can best be described by example. Assume that a developer desires to build a high rise apartment house on a parcel currently zoned R-2 (two family residential), which classification does not permit such development. The R-2 parcel abutts a far less restrictive R-5 High Rise Apartment district. The developer may seek to have his parcel rezoned to R-5 thereby permitting construction of the apartment building as a matter of right, or he may seek a rezoning to transition district R-2 (T). The planning staff, planning commission, and city council might be far more amenable to the latter approach, because after such a rezoning to R-2(T) the developer could undertake the development only after specific approval[112] of his "development plan" and subject to the conditions imposed by the Director of Buildings. After a rezoning to R-2(T), the developer submits a "development plan," illustrated by a plat showing boundaries of the parcel, location, size and use of structures, location of public and private ways, landscaping, and supplementary

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[109] CINCINNATI, OHIO, ZONING CODE § 803.1.

Sec. 803.1. Transition District. A Transition District may be established only in cases where it is adjacent to or abutting a District (or Districts) which is (or are) less restrictive than the R District to which the T District is related.

[110] *Id.* at § 802.3.

[111] Reclassifications to transition districts constitute a substantial proportion of zoning activity in the City:

Year	*1970*	*1971*	*1972*	*1973*
Total Rezonings	41	32	54	31
Rezonings in "T" Districts	8	8	20	9
Director of Buildings	26	18	21	16

[112] CINCINNATI, OHIO, ZONING CODE § 803.2:

Sec. 803.2. Requirement of Development Plan. Within a T District, as indicated on the Building Zone Map:

(a) A Development Plan shall be required for a development or use which is permitted in the less restrictive abutting District or any intermediate District less than the District to which the T District is related, but which development or use is not permitted in the District to which the T District is related.

data.[113]

In evaluating development plans, the Director of Buildings is guided by a standard that relates to the purpose of the technique, that is recognizing appropriate transitional parcels and permitting conditional development thereon. The standard used is a cost versus benefit balancing test:

> The [Director of Buildings] shall authorize the use of property in an R(T) District in accordance with a Development Plan only if the use proposed by the Development Plan is, by nature or by reason the controls imposed by the (Director of Buildings) not such a blighting influence on the properties in the R District that the detriment to such properties from such use will outweigh the advantage of such use to the owner or owners of the property sought to be developed under the Development Plan.[114]

The ordinance also guides the exercise of and limits the Director of Buildings' discretion by providing explicitly that the "objective" of his authority is the minimizing of the adverse impact of the transitional uses upon abutting properties in the R-2 District in order to preserve the character, attraction and orderly development of the R District while at the same time permitting the property in the T District to be developed for economically feasible uses.[115] Thus, in permitting special development in a T district, the Director has broad powers to condition his approval of the development plan.[116]

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[113] *Id.* at § 801.2:

Sec. 801.2. Development Plan: A plan for the development and use of a specified parcel or tract of real estate, illustrated by a plat showing the boundaries of such parcel or tract; the location, size, height and use of all structures; the location of all vehicular and pedestrian ways, both public and private; all landscaped areas; and further explained by such specifications, conditions and limitations as may be imprinted on the plat or described in a supplement thereto.

[114] *Id.* at § 804.2 (a).

[115] *Id.* at § 804.2 (d).

[116] *Id.* at § 804.2 (c).

(c) The [Director of Buildings];

(1) Shall have the power to modify front, side and rear yard requirements, density requirements, height and bulk of building requirements, but in no event shall any such modifications reduce said requirements to less than those applicable to the abutting less restrictive district.

(2) Shall have the power to require the use of materials or designs in the erection of structures which will minimize the adverse impact of the uses proposed by the Development Plan on the neighboring properties in the R District.

(3) May permit business signs, outdoor storage, parking spaces, loading docks and driveways under terms and conditions imposed by the Commissioner-of-Buildings.

(4) May require screening of the uses in the T District from the adjacent properties in the R District by walls, fences or landscaping.

The prescribed procedure for obtaining the Director of Buildings' approval of a use not permitted as right in the underlying R District is identical to that to be followed in conditional use and variance cases.[117] The ordinance requires among other things prior public notice to specified parties,[118] a public hearing,[119] and a written decision furnished to the applicant and previously notified parties.[120]

Enforcement of the substantive conditions imposed by the Director of Buildings is provided for by separate procedural conditions contained in the Director's approval letter.[121] Pursuant to those procedural conditions, the developer is required prior to the issuance of a certificate of occupancy and/or building permit(s) to (1) execute a written acceptance of the terms and conditions of the decision; (2) to record the decision letter and written acceptance in the office of the county land recorder; and (3) to file with the director evidence of such recordings. Another procedural condition requires the developer to include notice of the terms and conditions of the decision in any deed conveying all or a part of the property involved. Also, in the event that a building permit has not been obtained, or "substantial work" has not begun on the property within twenty-four months from the date of the decision, then the approval will be nullified and the underlying zoning regulations will govern. Finally, the terms of the decision provide that failure to comply with any condition therein stated is cause for the director to hold a revocation hearing.

An example of the creation of a "T" district is the Kroger controversy. In June through August, 1969, the planning commission held a series of hearings on a request to rezone four parcels of land under common ownership from several different residential and one low intensity business classification, in order to permit the construction and operation of a neighborhood shopping center. The proposal generated extensive citizen opposition and serious concern by the planning staff, but the planning commission recommended approval even though it was not possible under the ordinance to impose any conditions in connection with the proposed "straight" rezoning to B-2. In late 1969 (perhaps in part due to well-organized opposition led

(5) May impose such additional conditions and limitations on use, building dimensions, open space and the like as may be deemed necessary to carry out the intent of this Zoning Code.

[117] *Id.* at § 402.5.

[118] *Id.* at § 402.5(b).

[119] *Id.*

[120] *Id.* at § 402.5(c).

[121] *See* Decision of the Director of Buildings Granting a Certificate of Occupancy in Application No. A-739-1973, Standard Conditions Numbers 19-24 (October 12, 1974).

by a local civic association) the city council rejected the planning commission's recommendation and refused to rezone.[122]

Subsequently, the Kroger Company purchased the property, and in the spring of 1971 applied to rezone most of the property to R-5(T), a "Transition District" that would relate to the R-5 apartment zoning in the eastern adjacent parcel. It also requested a rezoning to B-2 of the smallest of the four parcels then zoned B-1. This request was tactical since absent a B-2 parcel adjacent to the proposed R-5(T) district, the proposed supermarket, drug store and shops could not have been later approved by the Director of Buildings because those uses are not permitted in a B-1 district.

In an extensive report to the planning commission dated May 27, 1971, the chief city planner emphasized that:

> Kroger now owns the land and is in a position to make serious commitments to develop the land as shown on their (sic) illustration plan. Also, a "T" zone system is proposed, which was not the case before, through which the commitment can be worked out and become binding.[123]

The report also suggested eleven conditions that should be imposed if a "T" zone were approved.[124]

The planning commission recommended and the council approved a rezoning which included a new B-2 classification for the small parcel and the placement of the remainder of the six acres in a transition zone [R-5(T)]. On August 1, 1972, pursuant to the ordinance, Kroger applied to the Director of Buildings for a certificate of occupancy (which in Cincinnati is issued prior to a building permit in such cases) and also filed a development plan for the project. After holding a public hearing on August 15th, and viewing the property and surrounding neighborhood, the director approved the development plan subject to conditions on October 15, 1972. Noting in his lengthy written decision letter[125] that part of the site abutted less restrictive districts (B-1 and B-2), the Director found that the supermarket, drug store, shops and parking facility were permitted uses in the B-2 district. Among the conditions imposed by the Director[126] were detailed requirements and prohibitions, finely tailored to the

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[122] *Report in the Matter of the Kroger Company to the City Planning Commission* at 3 (May 27, 1971).

[123] *Id.* at 5.

[124] *Id.* at 6.

[125] Decision of the Director of Buildings Granting a Certificate Occupancy in Application No. A-694-1972, October 5, 1972.

[126] *Id.*

unique characteristics of the proposed development: no truck delivery or gasoline powered refrigerated truck operations during certain evening hours; a guard or other approved system to prevent grocery carts being taken from the premises; the illuminated "Kroger" sign not to be back-lighted to the south, and the illumination to be discontinued one hour after closing time; the rear external wall (which faced residential units) to be painted brown;[127] the "shops" to be limited to those permitted in a B-2 district, but not restaurants, bars, cocktail lounges, or night clubs; limitations on hours of operation; and any deed conveying any or all of the property to declare the uses subject to the terms and conditions of the Director's decision. Also listed were several procedural conditions relating to enforcement of other conditions, that are routinely imposed when the director approves development plans in "T" district cases.[128]

In November, 1972, a neighborhood group filed an appeal from the director's decision with the board of zoning appeals, seeking certain "modifications" of the decision. The board held a hearing, visited the site, and upheld the director. The board's decision letter carefully tracked the standards applicable to the director's discretion and noted among other things:

> (1) that the conditions accomplished the objective of minimizing the adverse impact of the proposed development on the adjacent residential districts, while permitting the project property to be developed for an economically feasible use; and
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> (2) that the business uses, as controlled by the imposed conditions, would not have "such a blighting influence" on the adjacent

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[127] The Director regularly imposes aesthetic conditions on such approvals. His exercise of discretion to impose conditions structural material and design for aesthetic purposes was called into question in a 1973 case by a representative of a developer who had received conditional approval of a development plan to construct a 24-unit apartment building in an R-2(T) district. According to the representative, a rendering of the project submitted to the Director of Buildings prior to his conditional approval depicted wood frame front and rear elevations and brick veneer side elevations. However, in his decision letter, the Director had approved the plan, subject to 25 conditions, one of which was that "all elevations be substantially brick masonry construction . . ." (Decision of the Director of Buildings Granting a Certificate of Occupancy in Application No. A-739-1973, October 12, 1973).

In an appeal directed to the board of zoning appeals, the representative sought to delete the brick construction condition arguing among other things that the developer's proposed structure "will blend in with the surroundings much better than all-brick construction and be aesthetically pleasing, particularly to the adjacent property owners." (Letter of Appeal of Ganim Realty, dated November 9, 1973). He also contended that the matter had not been discussed prior to the Director of Buildings, decision. The Board of Zoning Appeals denied the appeal. (Decision and Resolution of the Zoning Board of Appeals in Case No. Z-3506-1973, January 23, 1974).

[128] *See* text at note 120, *supra.*

residential properties, so as to outweigh Kroger's economic advantage of the use.[129]

VI. CLEVELAND: OPTION TO REQUIRE APPROVAL OF SITE DEVELOPMENT PLANS INCIDENT TO REZONINGS

The Cleveland zoning ordinance authorizes the planning commission and/or the city council to require a rezoning applicant to submit a "site development plan" showing:

> the use of the land, the location and size of each proposed building; the height and number of stories of each proposed building; the number of square feet of lot area; the ratio of floor area to site area; the location of driveways and open space; the location and number of proposed parking spaces; and the location and identification of any screening or fencing.[130]

When a site development plan is requested, the planning commission and/or city council may require modification and may qualify the rezoning.[131] When a rezoning is approved by the city council under the site development plan procedure, the conditions are placed on the plan document, which is then filed with the planning commission and with the division of building.[132] A building or use permit issued with respect to the property so rezoned must be in accordance with the approved plans or with the regulations governing the district prior to the rezoning.[133] In the event that a building permit is not issued within six months of the effective date of the rezoning, the map amendment becomes void and the zoning reverts to the previous classification.[134] According to members of the planning staff this procedure was enacted in 1972 to curb abuses by developers whose projects were at variance with representations made to the planning commission and/or city council. In some cases for example, applicants for rezonings would present elaborate plans in order to persuade the commission and council to grant a rezoning, but then would sell the land to another developer, who would not build in accordance with the applicant-first owner's representations.

Large, complex projects and projects having potentially adverse

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[129] Decision and Resolution of the Cincinnati Board of Zoning Appeals Denying Appeal in Case No. Z-3504-1972, January 17, 1973.

[130] CLEVELAND, OHIO, ZONING CODE § 5.110303(b) (1951).

[131] *Id.*

[132] *Id.*

[133] *Id.*

[134] *Id.* The constitutionality of this provision is questionable in view of Hausmann v. Board of Zoning and Building Code of Appeals, *see* text at notes 33-42, *supra.*

effects on the neighborhood are often processed under the procedure. In practice, the degree of detail required to be submitted and approved ranges from simple preliminary conceptual data to detailed engineering drawings with elaborate specifications. Developers often voluntarily file under the procedure at the outset, in order to provide binding assurances to neighbors who might otherwise vigorously object to the development. Not uncommonly, city councilmen elected from wards in which the parcel is located will "request" that the planning staff process the case under the site development procedure when constituents have registered objections to a "straight" rezoning.

Two examples of rezoning applications as to which the planning staff recommended use of the site development plan illustrate the operation of the technique:

(1) The applicant requested a rezoning of two parcels from one-family residential to parking. The parcels were between an existing off-street parking lot on one side and a church on the other. The applicant contemplated an expansion of the off-street parking lot, and submitted plans providing "adequate screening and proper driveway locations in such a manner as to minimize traffic congestions and protect the adjacent residential areas."[135]

(2) An applicant sought a rezoning of a two and six-tenths acre parcel from multi-family to shopping center so as to permit the construction of a savings and loan building and a thirty-six unit townhouse development. The surrounding area was heavily developed with apartment buildings, some with local retail businesses on the ground floors of those buildings. In recommending approval under the site development plan procedure, the staff noted that the "proposed development provides building location, adequate screening, adequate off-street parking, proper driveway locations in such a manner as to minimize any traffic congestion and protect the adjacent residential areas."[136]

VII. COLUMBUS: PROMOTION OF ACCOMMODATION THROUGH NEGOTIATIONS AND GRANTS OF USE VARIANCES

Columbus utilizes two separate but often interacting restrictive rezoning/development approval techniques: (1) informal negotiations between applicants and the government (planning staff, development

[135] *Report in the Matter of Ordinance No. 1034-74 to the Cleveland City Planning Commission* (June 21, 1974).

[136] *Report in the Matter of Ordinance No. 436-74 to the Cleveland City Planning Commission* (April 5, 1974).

commission, and/or city council) that often result in advice (called pressure and blackmail by some observers) to "voluntarily" file deed restrictions or dedicate land, and (2) the grant by the city council of use variances.

Pre-application conferences among rezoning applicants[137] and various governmental agencies are common in Columbus. The discussions that begin at this early stage are characterized by participants as "negotiations." Basically they involve attempts by the planning staff to persuade rezoning applicants to modify their proposals to conform to the staff's thinking.[138] Additionally, the staff often informally recommends that developers prepare and execute particular deed restrictions or dedication deeds designed to minimize the potential adverse effects on surrounding property or costs to the city. As in Akron, such negotiations continue as the application is processed through the development commission, which issues recommendations on proposed rezonings,[139] and the city council. In one example of the negotiating process related to this author, the owner of a parcel of farm land filed a request to rezone to permit residential development. The staff requested and obtained, prior to the city council's hearing on the matter, right-of-way deeds to provide for future street installation that were to be recorded in the event that the city council approved the rezoning. In a like manner, developers are sometimes requested to vacate private streets or tender executed grants of easements.

Highly organized citizens' groups and zoning committees participate actively in this process. Affected groups are often consulted by developers both before and after rezoning applications are filed. In order to reduce or eliminate citizen opposition before the development commission or city council, applicants sometimes deed portions of a parcel to a civic group. Occasionally, they will file deed restrictions requested by a group. This method has a potential disadvantage; one zoning attorney stated to this author that the city might not have standing to enforce a deed restriction between the developer and civic group, which limits the use of the parcel. This problem might be resolved in appropriate cases by deeding real property interests to the city, with a right of reverter triggered by specified circum-

[137] Amendments to the Zoning Code and Map are governed by COLUMBUS, OHIO, CITY CODES ch. 3313 (1959).

[138] The Staff is authorized to and does regularly obtain reports from affected city departments that include departmental recommendations concerning whether the request should be approved. The staff coordinates such reports and advises the development commission whether or not to recommend approval. COLUMBUS, OHIO, CITY CODES § 3313.03(b) (1959).

[139] COLUMBUS, OHIO, CITY CODES § 3313.03(c)—(e) (1959).

stances.

Active negotiations among interested parties and agencies often continue after the development commission has heard a rezoning case and made a recommendation to the city council. At this point, the case is considered by the chairman of the city council's zoning committee,[140] who makes an oral report to the committee (which includes all city council persons). To expedite city council hearings, the chairman attempts to encourage the resolution of any differences among the planning staff, development commission, and the developer prior to council hearings. In many cases these negotiations result in general agreement before the scheduled date of the zoning committee hearing. If agreement is not reached, the committee may elect to defer consideration of the case. The committee then may suggest possible areas of accommodation or refer the matter to the development commission for additional analysis.

At the pre-application stage, developers often confer with the planning staff on the basis of a general use and design concept rather than a detailed, formal plan. Engineering and architectural plans are subsequently developed, incorporating preliminary staff and neighborhood comments.

The next step is the development commission hearing, at which applicants normally make a detailed presentation of the contemplated project. The vast majority of projects are apparently built in conformance with the developer's representations. The few exceptions were attributed by most observers to such factors as developer bankruptcy, changes in the desires of the real estate market, and (as regards commercial projects) changes in the needs of ultimate tenants or owners. A high degree of compliance with representations is attributable to the long term goals of the developers. Most developers recognize that because they will eventually request additional rezonings; therefore, there is a powerful incentive to "build as promised."

The city council is not reluctant to downzone a parcel when it learns that the previous representations have been, or apparently will be violated. In one reported situation a developer presented an elaborate plan for a tasteful commercial center, including restaurants and offices throughout all hearings. After the rezoning was granted, the developer applied for a building permit to construct a large discount store. Following prescribed administrative procedure for processing building permit applications, the city's zoning examiners reviewed the pertinent rezoning file and noted the discrepancy. Within days, the

[140] *Id.* §§ 3313.04, 111.01.

city council voted to rezone the parcel to its previous classification. To avoid such problems, one staff member and a zoning attorney stated that they normally advise developers to inform the development commission in advance in cases of "major" deviations from previously represented plans.

The Columbus zoning ordinance prohibits the board of zoning adjustments from granting use variances.[141] Use variances can be obtained only from city council. This power apparently derives from the council's general legislative powers, as neither the zoning ordinance nor the council's rules of procedure refer to use variances. Because such variances permit uses that are otherwise prohibited in the applicable zoning district, they function much like rezonings but are granted only upon a showing of "unnecessary hardship." Technically, a rezoning involves a change in the zoning map and therefore the ordinance, whereas a use variance does not alter the applicable zoning classification but "waives" those provisions of the classification that operate to prohibit the contemplated use.

Grants of a use variance subject to conditions and limitations have been used in Columbus to control development of a more intense character than permitted in the applicable zoning classifications. For example, when the German Village,[142] Italian Village,[143] and Victorian Village[144] historical preservation areas were being upgraded in quality and types of use, developers sought and were granted rezonings rather than use variances because mortgage financing was difficult or impossible to obtain when the contemplated development was only permitted by virtue of a variance. When redevelopment became quite extensive in the preservation districts most of the city councilmen apparently felt that the overall zoning pattern was generally consistent with the various plans for the area. At that point in the area's development, the city council began to permit the introduction of small tourist businesses (*e.g.*, craft centers, ethnic shops and restaurants) by granting use variances rather than rezonings. This policy reflected the council's judgment that rezonings to high intensity districts would allow an overly broad range of uses, some of which could be potentially damaging to such a fragile area. However, particular use variances would complement the existing development of the area.[145]

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[141] *Id.* § 3309.06(a). Nothing herein shall be construed as authorizing the Board to effect changes in the Zoning Map, or to add to the uses permitted in any district."

[142] *Id.* at § 3306.04.

[143] *Id.* at 3314.04.

[144] *Id.* at 3315.04.

[145] Letter from Helen M. Van Heyde, City Clerk to the author, May 7, 1975.

Outside of the historical preservation districts, use variances are commonly granted "for non-sensitive, oblivious (sic) commercial uses, such as home beauty parlors, barber shops, home workshops, etc. in residential districts. In this situation, each application is reviewed in light of its potential impact upon the precise character of the residential area to be affected, and the opinion of the citizens of those areas."[146] In one recent case, a married couple obtained a use variance to manufacture and sell handcrafted arts and crafts items in their residence located in an Apartment-Residential Office District. The variance was subject to six conditions: (1) ownership and use by the applicants only for the contemplated use, or any use permitted as of right in the zoning district; (2) manufacture in the basement and sales on the first floor only; (3) review of the operation by the zoning staff; (4) no expansion of premises for business purposes; (5) a sign limited as to area and location, and (6) no interference with the residential character or use of surrounding properties, which is determined by the city council to be objectionable and excessive.[147]

Use variances commonly are sought by developers in order to overcome potential neighborhood objections to a rezoning. One illustration given to this author by a zoning attorney hypothesized a site zoned for two family residences on which a developer proposed to construct a restaurant, a use permitted as of right in a C-3 Commercial district. The developer might adopt a two-step strategy if he anticipated objections at the development commission and city council hearings. First, he would petition for a rezoning to C-2 Commer-

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The Columbus City Council has in recent history adopted use variances in [this] general situation . . . .

Many areas of our city are endowed with particular historic, aesthetic, or cultural values which we have sought to preserve. Examples of these areas are known as German Village, Victorian Village and the Model Cities Neighborhood.

In trying to sustain the values which make these areas unique, the Council has enacted various "Area Rezonings." For instance, all of German Village is R2-F, a residential district, in its entirety. In such a case, all commercial activity operates under a use variance, so the city has kept greater control. As you know, the majority view of the law is that such a variance is in personam to the grantees, being either the owners or operators of the subject property. As it does not run with the land, the use for which the variance was granted is the only legal use to which that property may be put.

[146] Letter, *supra* note 145.

[147] COLUMBUS, OHIO, ORDINANCES NO. 649-75 (1975).

In another recent situation, the city council granted a use variance to permit the operation of a barber shop in an AR-1 Apartment Residential District, subject to three conditions: that the barber shop have no more than three (3) barber chairs, that the structure not be expanded, and that the operation could be reviewed by the zoning staff. COLUMBUS, OHIO ORDINANCE NO. 252-75 (1975).

cial (a district whose permitted uses are not as strongly disfavored by neighbors), and then seek from the council a variance to permit the development subject to whatever conditions and limitations the council deemed necessary to protect the surrounding area.

The use variance technique also is utilized in another type of situation. In Columbus, public opposition is often greater if the proposed rezoning is to a commercial rather than to an industrial district. This reported difference in attitude is difficult to explain rationally, but some citizens and public officials apparently feel that rezonings to commercial classifications will lead in "domino" fashion to a series of subsequent undesirable rezonings in the area. By reason of such public perceptions, it is not uncommon for a developer with a commercial proposal to minimize opposition by petitioning for a rezoning to an inappropriate industrial zoning district in which the proposed use would not be permitted and then petitioning the city council for a use variance to accommodate the proposed development.[148]

Another situation in which a developer might seek a use variance rather than a rezoning is when the delay occasioned by the normal rezoning processing procedures would effectively preclude the project. In one reported case, a community center operated by a religious group desired to expand its building which would be economically feasible only if the construction contract could be executed within five days. The group's attorney sought and received a use variance, granted by council after a review of the engineering drawings, avoiding several steps in the process since use variance applications are not considered by the development commission or the planning staff.

VIII. DAYTON: REZONINGS SUBJECT TO CONDITIONS ACCEPTABLE TO THE APPLICANT

The Dayton zoning ordinance requires rezoning applicants to submit, among other things, a duplicate site plan showing the actual dimensions of the property, lot numbers, existing and proposed uses, and the zoning classification of all surrounding lands located within 250 feet of the parcel.[149] The application form prescribed by the plan board staff requires additional data, much of which relates to the impact of the proposal on surrounding property and possibly appro-

[148] In April 1975 a use variance was granted to permit the construction of a housing project for the elderly on a twelve and four tenths acre site located in an industrial zone, subject to seventeen and four tenths dwelling unit per acre density limitation. COLUMBUS, OHIO, ORDINANCE NO. 639-75 (1975).

[149] DAYTON, OHIO, CODE OF GEN. ORDINANCES § 247(3)(c).

priate conditions that might be imposed in connection with any rezoning. The applicant's written rationale for the requested reclassification must include, among other things:

> Whether the uses that would be permitted on the property, if it were reclassified, would be compatible with the uses permitted on other property in the immediate vicinity. The applicant may suggest use restrictions that would be permitted on the property if it were reclassified in order to attain compatibility with the uses permitted on other property in the immediate vicinity.[150]

The staff's initial reaction (including statements as to possible conditions it might recommend) is often elicited before a rezoning application is filed, but no statement or representation by any staff member is binding on the board, the city commission or any other city official.[151]

After its hearing of a case, the plan board is required[152] to prepare and transmit to the city commission a report, which must include statements as to:

> Whether the uses that would be permitted on the property if it were reclassified would be compatible with the uses permitted on other property in the immediate vicinity. The Plan Board may suggest conditions and restrictions on the uses that would be permitted on the property if it were reclassified in order to attain compatibility with the uses permitted on other property in the immediate vicinity.[153]

In the event that the city commission elects to grant a map amendment, it may impose special conditions and requirements on the uses, buildings and structures if the applicant will accept such special conditions and requirements.[154] If the plan board recommends that the amendment be granted without special conditions or requirements, the city commission may not attach any special conditions or requirements without first referring the proposed amendment and the proposed special conditions and requirements back to the plan board for further consideration.[155] In practice, the plan board often recommends approval of a rezoning subject to conditions, but before the case is transmitted to the city commission for action, the staff will

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[150] Plan Board, Zoning Map Amendment Filing Information, item 3(c).
[151] DAYTON, OHIO CODE OF GEN. ORDINANCES § 2417.
[152] *Id.* at § 2419.
[153] *Id.* at § 2421(3).
[154] *Id.* at § 2427(1).
[155] *Id.* at § 2427 (2).

request and obtain from the developer written concurrence with the added conditions. If the city commission decides to rezone subject to conditions, the ordinance requires the commission prior to the rezoning to require a "bond, covenant or other adequate assurance from the applicant to insure compliance with such special conditions and requirements."[156]

In September 1974, the city commission rezoned a parcel from OR-2 (Office Residential) to B-3 (General Business) for a limited period of three years from the date of the rezoning. The city commission imposed four conditions, recommended by the plan board and agreed to by the applicant:

> (1) Three years from the effective date of the enacting ordinance, the Plan Board shall initiate rezoning action from the B-3 to the OR-2 District for [the lot], at which time the established use shall terminate.
>
> (2) No permanent structures are to be erected other than security or screening fencing. Such fencing shall be at least 6 feet high, be of chain link with redwood slats, or be suitably covered with a rapid growth vine for the purpose of screening the proposed use from [a major thoroughfare].
>
> (3) A fifteen foot setback and landscaped area shall be established along the north line of (the lot).
>
> (4) The Plan Board shall review and approve the site plan to insure that adequate screening and landscape provisions are to be installed as part of the development.[157]

Another example of conditional rezoning involved a request to rezone certain parcels located proximate to existing high density residential areas to B-2 (Community Business). The plan board recommended approval of the rezoning subject to four conditions, to which the applicant agreed, and the city commission followed that recommendation in rezoning the property in March, 1973.[158] The most significant of the conditions was the requirement that "prior to the development of the area, a commercial planned unit development application (pursuant to the zoning ordinance) shall be filed with and approved by the Plan Board."[159] That condition incorporates all requirements of the planned unit development provisions of the ordinance, which mandate that the applicant submit and obtain the plan board's approval of such items as: a statement identifying the princi-

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[156] *Id.* at § 2427 (1).

[157] DAYTON, OHIO ORDINANCE 24790 (1974).

[158] DAYTON, OHIO, ORDINANCE 24444 (1973).

[159] *Id.*

pal contemplated uses,[160] a detailed site plan,[161] statements respecting land use intensity, and building details,[162] and feasibility date.[163] The submissions would require specific approval subject to criteria relating to such matters as density,[164] site accessibility,[165] site layout,[166] and if applicable, common open space.[167] Three conditions were imposed that were not related to the planned unit development filing.[168]

Conditional rezonings are also granted in connection with applications for planned developments. In one illustrative case, the city commission approved the recommendation of the plan board to rezone thirty-seven acres of land to B-3 (General Commercial) to permit the development of two golf courses, "pro-shop," tennis courts and related facilities. The conditional rezoning ordinance was immediately followed by a second ordinance approving a commercial planned development. Two conditions were imposed: a prohibition of all B-3 uses except a golf course, plus ancillary facilities, and, a requirement of submission and approval of a commercial planned development application.[169]

IX. CONCLUSIONS

While a detailed comparative critique of the techniques would unduly lengthen this essentially descriptive article, a few broad observations are in order.

1. The restrictive rezoning/development approval techniques

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[160] DAYTON, OHIO, CODE OF GEN. ORDINANCES § 2278.

[161] *Id.* at § 2279.

[162] *Id.* at § 2280.

[163] *Id.* at § 2282.

[164] *Id.* at § 2293.

[165] *Id.* at § 2294.

[166] *Id.* at § 2295.

[167] *Id.* at § 2296.

[168] DAYTON OHIO, ORDINANCE 24444 (1973).

1. Vehicular access shall be limited to one left turn only access on Tuttle Avenue, and two access drives on Smithville Road spaced at least 250 feet apart from other intersecting streets and driveways. The 250' spacing criterion applies to intersecting streets on the east side of Smithville Road.

2. The following uses shall be excluded from the permitted use list: automobile service stations, bowling alleys; carpentry and cabinet shops, carpet and rug cleaning, catering services; dance halls; dancing schools; driver training schools; equipment rental services with outdoor storage; exhibit halls; exterminating services; hearing and air conditioning; electrical and plumbing sales; ice rinks; printing, publishing, binding and typesetting houses; roller rinks, shooting galleries; slot car racing; taxidermists; theaters; used or second-hand merchandise retail sales.

3. Signs shall conform to the standards of the B-1 and B-1A Districts rather than the B-2 District.

[169] DAYTON, OHIO, ORDINANCE 24822 (1974).

surveyed in this article represent the efforts of different Ohio cities to reach appropriate accommodation between the interests of developers seeking more intensive use for their properties and of neighboring landowners whose land might be adversely affected by such development.[170] This accommodation problem is faced by local governments of varying sizes, and should become more significant as cities and the zoned townships in Ohio[171] develop more sophisticated techniques to control land development and use.

The experience of the cities studied strongly suggests the desirability of including in zoning ordinances a restrictive rezoning/development approval technique, which would operate (1) to afford a degree of flexibility to reconcile various interests affected by land reclassifications, (2) to indirectly encourage the utilization of properties which, due to inadequate zoning, have been overlooked for development, and (3) to foster creativity of land planners in developing techniques such as mixed housing types in a single zoning district, thus responding to the state's housing needs.[172] .

Political feasibility will probably be the most significant factor in determining whether such techniques will be adopted in a jurisdiction. The devices utilized should have a basis of acceptability by public officials, private citizens, and various interest groups who are

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[170] The rezoning process of amending the zoning district map is the most common context in which such techniques operate. It is here when "the community's real land use policy comes to be expressed." J. KRASNOWIECKI, BASIC SYSTEM OF LAND USE CONTROL: LEGISLATIVE PRE-REGULATION V. ADMINISTRATIVE DISCRETION, THE NEW ZONING 3, 4 (1970).

Bosselman has perceptively noted that:

> In the blush of its youth, zoning was sold not as a process but as part of a system of planning that would determine in advance the uses permissible of all land within the community's jurisdiction. Its proponents believed that such a comprehensive plan was an essential element of zoning's legal validity. Zoning has been upheld by the courts. Basset said "because it is comprehensive and not piecemeal." Comprehensiveness would allow the zoning regulations to be self-executing, removing the dangers of arbitrary administration. The boundary of each zone was to be determined in advance, and changes in these boundaries were to be regarded as unusual. This theory has been described as the "static end state concept of land use control."
>
> In practice, however, it is the changes that are more important than the regulations. Most communities use the "wait and see" approach to zoning. They adopt relatively restrictive standards that they do not really expect developers to meet, and then change these standards in response to specific proposals by developers: "The developer proposes, and the municipality disposes. Sometimes the process is guided by useful plans and standards, but often not." But it is the process that is important, not the original zoning plan.

Bolsselman, Book Review, 4 URBAN LAW 174, 175-76 (1972).

[171] D. Shutt, *Dispute in Fulton County is Sample of Controversy over Final Zoning*, The Toledo Blade, February 17, 1975, at 17.

[172] R. Shapiro, *The Case of Conditional Zoning*, 41 TEMP. L. Q. 267, 284-86 (1968).

participants in the land use decision making processes.[173]

2. Implicit in the foregoing discussion is a critical policy question: how should discretion be allocated among the legislative body, the administrative board (*e.g.* the plan commission), and the city officials? Traditionally, but with notable exceptions, zoning ordinances conferred little discretionary authority on administrative officials or bodies prior to the issuance of a building permit. This approach was the product of several factors: (1) the ease of imposing complex regulations at the local level without such delegation, (2) an attitude that removal of land use decisions one step further from the citizens was undesirable, and (3) the personnel in administrative bodies are often not professionals in land use matters.[174]

As land use control techniques became more sophisticated and local governments turn away from detailed preregulation of development proposals, the desirability of entrusting more authority in experts has become evident. Studies in Akron and Toledo indicate that professionals on planning staffs tend to recommend approval of fewer rezoning requests than are ultimately approved by city councils. Perhaps this is true because local political pressures are more directly brought to bear on councilmen, who are somewhat less oriented to planning considerations than are staff members. In each city studied, the views of the staff have a significant impact on rezoning and related land use decisions and any conditions imposed in connection with approvals are normally the product of staff study and negotiations with the developers.

Of the cities studied, only Cincinnati has conferred a meaningful portion of the decision making authority on a professional—the Director of Buildings. This approach has worked well in Cincinnati, because it affords consistency in the implementation of land use policies, both in cases of application for transition district development and in cases of conditional use and variance approvals.

3. Irrespective of the authority to impose conditions, it is appropriate to promote efficiency and fairness by articulating in the zoning ordinance both procedural steps and the common types of permissible restrictions. The number, type and detail of conditions actually imposed in the cases noted in this article vary widely, apparently reflecting such factors as the degree of appropriate protection from undesirable externalities generated by particular projects and the attitudes of the city officials and board members respecting the

[173] F. Bosselman, et al. *Coordination of Environmental and Land Use Controls*, PHASE II REPORT NATIONAL SCIENCE FOUNDATION (1975).

[174] American Society of Planning Officials, AMENDING THE ZONING ORDINANCE (1958).

extent of control that may fairly be exerted on the developer. Especially when extensive conditions are normally imposed (*e.g.* Akron and Cincinnati), advance warning of the possible scope of such controls should be afforded to prospective developers.

Additionally, the ordinance should clearly set forth the purposes, standards and guidelines applicable to the process of imposing conditions so as to notify participants what is expected of them and what the public policy goals are. Inclusion of these matters is particularly important when authority has been delegated to an administrative body or official, in order to minimize the risk of successful judicial attack based upon improper delegation of legislative functions.[175] The categories of restrictions and standards should be clear and reasonably related to promoting public health and safety, lest the exercise of the authority be successfully attacked on the ground that it exceeded the scope of the city's police power.[176]

4. Techniques designed to limit potentially adverse effects of proposed developments should be clearly identified as formal devices adopted for that purpose. Hence extra-ordinance deed restrictions and dedication requirements may tend to undermine public confidence in the impartiality of zoning administration; that is, they may prevent effective citizen participation at rezonings and other hearings. Also, use variances are inappropriate substitutes to restrictive rezoning techniques because many if not most applications do not involve true "hardship" as opposed to mere loss of a profitable opportunity and the approach is an artificial method for achieving a result that is appropriate only if a zoning change is in order.[177]

5. Conditions attached in connection with rezonings or development approvals will have little practical effect absent an effective enforcement mechanism and conscientious administration. The systems surveyed here involve a number of enforcement devices, and any local government adopting a restrictive rezoning/development approval technique should carefully consider which of a number of such enforcement methods would be most appropriate in that jurisdiction. Particularly useful methods include:[178]

(1) Withholding the issuance of building permits, occupancy certificates and the like until the conditions have been met;

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[175] *See* D. Mandelker, *Delegation of Power and Function in Zoning Administration*, WASH. UNIV. L.Q. 61 (1963).

[176] *See* Strine, *The Use of Conditions in Land Use Control*, 67 DICK. L. REV. 109 (1963).

[177] See Note, *The Use and Abuse of Contract Zoning*, 12 U.C.L.A. L. REV. 887, 913 (1965).

[178] *Id.* at 907-12.

(2) Treating the breach of conditions as a violation of the zoning ordinance and subject to its penalties; and

(3) Requiring periodic assurances to the city by the developer that he will continue to be able to complete the development in the manner required, such assurances taking the form of an escrow deposit or performance bond.[179] Taken together, the various enforcement-related terms and conditions included in the Cincinnati Director of Buildings' Decision Letters approving development plans in "transition districts" are the most comprehensive studied,[180] and appear to avoid the legal difficulties suggested by the *Hausmann* Case.[181]

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[179] Zoning Procedures Study Committee, *Planning and Zoning For Fairfax County Virginia* 54 (1967).

[180] Text at note 120, *supra.*

[181] Text at notes 40-42, *supra.*